



AN OVERVIEW OF PUBLIC CHARGE

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I. Introduction

Since the inauguration of President Trump, three separate documents related to “public charge” have been leaked. The most recent document was a draft proposed regulation circulated in the press in March 2018. A proposed regulation seeking to make major changes to existing public charge law is expected to be published this summer in the Federal Register, yet **no new regulation has been implemented and any change will require a lengthy process.**

Although the use of most public benefits had not been a barrier to legal status in the United States for many years, news of possible changes to this status quo has caused families to disenroll from programs for which they qualify or to avoid seeking services out of fear that ICE will target certain locations for enforcement. Additionally, some legal practitioners have been discouraging clients from accessing critically needed services because of uncertainty as to what services could jeopardize future immigration options for their clients.

This advisory seeks to provide practitioners with current information about the status of public charge.

II. What is public charge?

“Public charge” is a **ground of inadmissibility** that could bar an individual’s admission to the United States on a visa or adjustment of status to that of a lawful permanent resident (ability to get a green card).¹ Under Immigration and Nationality Act (INA) § 212(a)(4), an individual seeking admission to the United States or seeking to adjust status is inadmissible (and therefore unable to enter the United States or receive a visa or green card) if the individual, “at the time of application for admission or adjustment of status, is likely at any time to become a public charge.” This ground of inadmissibility is triggered if the government determines the individual is likely to become primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or institutionalization for long-term care at government expense.¹

Receiving public benefits does not automatically make an individual a public charge. A number of factors must be considered when making a determination that a person is likely to become a public charge.

Currently, for immigrants adjusting status or seeking admission, only benefits received by the individual applying for admission or to adjust status are considered. Public benefits received by family members are not counted against the

¹ There is also a ground of deportability related to public charge. The ground of deportability impacts permanent residents and others that have been admitted to the United States. The deportation ground related to public charge is very different from the law discussed here and was not addressed in leaked versions of the draft proposed regulation.

person applying for admission or adjustment for public charge purposes unless the cash benefits amount to the sole support of the family.

Public charge does not apply in naturalization proceedings.

A. Is Public Charge a New Policy?

No. Public charge has been a concept in immigration law since the Immigration Act of 1882. For about the last twenty years, the definition of a public charge is someone “primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance, or institutionalization for long-term care at government expense.”

B. Who is subject to a public charge test?

Individuals applying for admission to the United States or adjustment of status (a green card) are subject to public charge unless they fall under certain statutorily exempted categories (see below).

C. Who is NOT subject to public charge?

There are certain groups of people who are either exempt from public charge or may get a waiver for public charge when applying for admission to the United States, a green card, or other benefits with USCIS. These include:

- Refugees and asylum applicants²
- Refugees and asylees applying for adjustment to permanent resident status³
- Amerasian Immigrants (for their initial admission)⁴
- Individuals granted relief under the Cuban Adjustment Act (CAA)
- Individuals granted relief under the Nicaraguan and Central American Relief Act (NACARA)
- Individuals granted relief under the Haitian Refugee Immigration Fairness Act (HRIFA)
- Individuals applying for a T Visa⁵
- Individuals applying for a U Visa⁶
- Individuals who possess a T visa and are applying for adjustment to permanent resident status⁷
- Individuals who possess a U visa and are applying for adjustment to permanent resident status⁸
- Special immigrant juveniles⁹
- VAWA self-petitioners¹⁰
- Applicants for Temporary Protected Status (TPS)¹¹
- Individuals applying to renew DACA status

Example: Jenin is an approved VAWA self-petitioner. She is eligible for a number of public benefits as a VAWA self-petitioner but is worried that her receipt of public benefits could impact her ability to get a green card later. However, if she adjusts as a VAWA self-petitioner she is exempt from the public charge ground of inadmissibility.

Example: Ahupathi was approved for Temporary Protected Status (TPS). When he applied for TPS, he did not have to address public charge concerns as the ground of public charge does not apply to TPS applicants. Now he is married to a U.S. citizen and ready to adjust status. Even though he has TPS status, he *will be* subject to a public charge determination when he applies to adjust status as there is no special exemption for TPS holders at the time of adjustment through a family member.

D. How does the government decide if someone is likely to be a public charge?

There are two tests relating to public charge.

1. Totality of circumstances test

The traditional, **“totality of circumstances” test** considers several factors. Adjudicators shall “at a minimum” consider the person’s age, health, family status, assets, resources, financial status, education, and skills, and can also consider an affidavit of support.¹²

Receiving public benefits does not automatically make an individual a public charge; the officer must consider all circumstances. It is important to note that, in making this determination, the adjudicator is not supposed to rely on a single factor, such as past receipt of public benefits. Rather, the adjudicator needs to consider all of the factors in conjunction and must weigh both the positive and negative factors to determine whether the applicant is likely to become a public charge.¹³ This test is forward-looking—the officer is supposed to consider all factors as it relates to *future* likelihood that the person will become dependent on the government.

2. Affidavit of support

The second test is an **affidavit of support**. This requirement applies *only* to persons immigrating through a family visa petition and in some cases, employment-based petitions. Under this test, most people immigrating through a family visa petition *must* have an affidavit of support on Form I-864 submitted on their behalf, or they will be found inadmissible as a public charge.¹⁴ There are some exemptions, and those who fall into these exemptions have to file form I-864W instead.

The I-864 affidavit of support requires the person to have a certain level of income or assets (for income, 125% of the Federal Poverty Income Guidelines), and it is a legally enforceable contract to provide financial support to the applicant.

E. What public benefits does the government consider when making a public charge determination?

Not all publicly-funded benefits are relevant to deciding whether someone is likely to become a public charge. For example, forms of assistance other than cash assistance, such as food stamps, health insurance, and rental assistance, are not considered negative factors in the public charge determination. In assessing the totality of the circumstances, an adjudicator may consider receipt of public cash assistance for income maintenance or institutionalization for long-term care at government expense to determine whether that person is likely to become primarily dependent on the government for subsistence. Short-term institutionalization for rehabilitation is not subject to public charge consideration under existing field guidance.

Therefore, the only programs currently considered to determine if someone is likely to be a public charge are:

- Cash assistance for income maintenance
 - Supplemental Security Income (SSI)
 - Temporary Assistance for Needy Families (TANF)(called CalWORKs in California)
 - State and local cash assistance programs (often called “General Assistance” programs)
- Institutionalization for long-term care at government expense
 - In a nursing home or mental health institution, and
 - Covered by Medicaid

If an individual receives public cash assistance, the length of time during which the individual received this assistance may be significant in determining public charge. The government has stated that the more time that has passed since an individual received cash benefits or was institutionalized, the less weight these factors will have as a predictor of future receipt of benefits.¹⁵

Example: Kar Wai will be eligible soon to adjust status (apply for a green card) through a petition filed by his permanent resident spouse. At the time of his green card interview, he should be prepared to show that he is not likely to be primarily dependent on government aid to survive. Although Kar Wai's family received cash assistance from the government years ago, he has since graduated from high school and is in a job training program. His prior receipt of cash assistance will not be the only factor considered in determining whether he is likely to be a public charge in the future. The government will consider the fact that Kar Wai has not received cash assistance for many years, along with his new job skills and the financial support that his spouse can provide.

F. What public benefits programs are not considered when making a public charge determination?

Past, current, or future receipt of non-cash benefits and special-purpose cash benefits that are not intended for income maintenance are not subject to public charge consideration. These include:

- Non-cash benefits (other than institutionalization for long-term care)
- Non-cash TANF benefits such as subsidized child care, transit subsidies
- Medicaid and other health insurance and health services (including public assistance for immunizations and for testing and treatment of symptoms of communicable diseases; use of health clinics, short-term rehabilitation services, and emergency medical services) other than support for long-term institutional care (called Medi-Cal in California)
- Children's Health Insurance Program (CHIP) (called Healthy Families in California)
- Nutrition programs, including Food Stamps, the Special Supplemental Nutrition Program for Women, Infants and Children (WIC), the National School Lunch and School Breakfast Program, and other supplementary and emergency food assistance programs
- Housing benefits
- Child care services
- Energy assistance, such as the Low Income Home Energy Assistance Program (LIHEAP)
- Emergency disaster relief
- Foster care and adoption assistance
- Educational assistance (such as attending public school), including benefits under the Head Start Act and aid for elementary, secondary, or higher education
- Job training programs
- In-kind, community-based programs, services, or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter)
- Prison, jail, incarceration costs
- Privately-funded treatment programs

State and local programs that are similar to the federal programs listed above are also generally not considered for public charge purposes. Finally, any programs that are entirely funded by private entities are not considered for public charge.

G. Whose receipt of public benefits are considered?

Currently, for immigrants adjusting status or seeking admission, only benefits received by the individual applying for admission or to adjust status are considered. Public benefits received by family members are not counted against the person applying for admission or adjustment for public charge purposes unless the cash benefits amount to the sole support of the family.

However, for visa applicants who are consular processing (going through the process at a U.S. consulate abroad), recent changes to the Foreign Affairs Manual (FAM) may impact consular officials' public charge adjudications.¹⁶ According to guidance issued in January 2018, past or current receipt of public assistance of any type by the visa applicant or a family member in the visa applicant's household may be considered to determine whether the applicant is likely to become a public charge in the future. However, the determination must be made on the present circumstances. If the applicant's financial circumstances are significantly different than when the applicant received public assistance, that would be a factor against a public charge finding. If the applicant's financial circumstances are similar, that would be a strong factor in favor of finding the person to be a public charge.

Also, a sponsor's past or current receipt of means-tested benefits (including many of the forms of assistance listed above) may be a factor in making a public charge determination, if it affects the applicant's resources and financial status, including the sponsor's ability to support the applicant. According to FAM guidelines for consular processing, if a sponsor or any member of his or her household has received public means-tested benefits within the past three years, the consular official must review fully the sponsor's current ability to provide the requisite level of support, taking into consideration the kind of assistance the sponsor received and the dates received.

H. Could being a public charge make someone deportable?

Permanent residents and others that have been admitted to the United States on a visa already are subject to grounds of "deportability." The public charge deportability ground applies in an even more narrow set of circumstances than the public charge inadmissibility ground, and to date it has been only rarely enforced. Noncitizens are deportable if they become a public charge anytime within five years after their last entry, unless they can prove that they became a public charge because of something that happened after entry.¹⁷

Example: John is a permanent resident whose last entry into the United States was in 2009. In 2011, he was in an accident at work and became disabled. He collects Social Security Income (SSI) and other benefits, and he will never be able to work again. Is John deportable?

No. John is not deportable, even though he became a public charge within five years of his last entry, because he can show that the cause of his becoming a public charge (his accident) is something that happened after his last entry.

In practice, very few people have been put into removal proceedings or removed based on this deportability ground. Cases have held that a person does not become deportable under the public charge ground for simply having received a public benefit.¹⁸ Rather, case law establishes three requirements that must be present for a person to be removed as a public charge: 1) the benefit program must provide that the state or other public entity can sue the recipient or other specified persons for repayment, 2) the public entity must demand repayment, and 3) the immigrant must refuse to pay for the cost demanded by the public entity.¹⁹

End Notes

¹ See “Field Guidance on Deportability and Inadmissibility on Public Charge Grounds,” 64 FR 28689 (May 26, 1999).

² INA § 207(c)(3).

³ INA § 209(c).

⁴ 8 USC § 1101 note 5.

⁵ INA § 212(d)(13)(A).

⁶ INA § 212(a)(4)(E)(ii).

⁷ INA § 212(d)(13)(A).

⁸ INA § 245(m).

⁹ INA § 245(h)(2)(A).

¹⁰ INA § 212(a)(4)(E)(i).

¹¹ 8 CFR § 244.3(a).

¹² INA § 212(a)(4)(B).

¹³ See Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 286289 (May 26, 1999).

¹⁴ INA § 212(a)(4)(C).

¹⁵ See Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 286289 (May 26, 1999).

¹⁶ 9 FAM 302.8-2(B)(2)

¹⁷ Under 1990 amendments to the INA, a noncitizen who “within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable.” In other words, people who become a public charge within five years of their last entry are not deportable if they can prove that this was caused by something that happened after that entry. INA § 237(a)(5).

¹⁸ *Matter of B*, 3 I&N Dec. 323 (BIA and AG 1948).

¹⁹ See *Matter of V.*, 2 I&N Dec. 78 (BIA 1944); *Matter of Kowalski*, 10 I&N Dec. 159 (BIA 1963); and *Matter of C.*, 2 I&N Dec. 538 (BIA 1946).



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